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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

EMIL A. SEES,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI.

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May 10, 1957

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IN THE

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No. .....

EMIL A. SEES,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Emil A. Sees petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on January 23, 1957.

The judgment below relates to the conviction of the petitioner for allegedly attempting to monopolize the dissemination of news and advertising in a four-county area including and surrounding Kansas City, Missouri. That conviction was affirmed by the Court of Appeals for the Eighth Circuit.

This case is a companion case to *The Kansas City Star Company* v. *United States of America*. The two cases were tried together. Separate judgments were entered and separate appeals were taken on the same record.

Review by this Court of the decision herein is of great importance for the same reasons as in the *Star* case, and the considerations which necessitate the granting of certiorari, which are stressed in the petition in behalf of the Star, will not be repeated, but appropriate reference will be made in this petition to the separate petition of the Star.

The conviction of petitioner and the affirmance thereof present additional separate questions of great importance in the administration of the federal criminal law in complex antitrust prosecutions such as this case.

Opinions Below.

The opinion of the District Court denying defendants' motion to set aside the verdict of guilty and for judgment of acquittal or in the alternative for a new trial is printed at pp. 324-9 of the record. The opinion of the Court of Appeals is reported in 240 F. 2d 643, and is printed as Appendix A hereto.

Jurisdiction.

The judgment of the Court of Appeals is dated and was entered on January 23, 1957, and is printed as Appendix B hereto. The petition for rehearing was duly filed on February 11, 1957; the order denying the petition for rehearing is dated March 13, 1957. On April 2, 1957, Mr. Chief Justice Warren extended the time within which to file a petition for a writ of certiorari to and including May 12, 1957.

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(1).

Questions Presented.

In addition to the questions presented in the Star's petition for certiorari, this case presents the following important questions:

1. Can petitioner be guilty of an attempt to monopolize solely by reason of the existence of the Star's unit advertising rate policy which was erroneously viewed as a tying arrangement, which petitioner did not establish and could not alter, and without any consideration being given to the proven legitimate business aims which this Court in *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594, held to justify the practice?

2. Should the field of competition with respect to the dissemination of news and advertising be restricted to daily newspapers and radio and television stations physically located or published in metropolitan Kansas City, or should it also include non-dailies, magazines, other periodicals, direct mail advertising and other media in metropolitan Kansas City, as well as radio stations located outside Kansas City and publications published outside Kansas City which disseminate news and advertising therein?

3. The charge to the jury contained the following definitions of the offense charged:

> "An attempt to monopolize, as used in Count I of the indictment, means the employment of methods and practices which are utilized for the specific purpose and with the specific intent to achieve or build a monopoly, and *which, if successful, would be likely to accomplish monopolization.*" (R. 2443-4) (Emphasis added).
>
> " 'Specific intent' means that the defendants must have done certain things with monopoly as their ob-

jective, *which, if successfully performed, could result in actual monopolization.*" (R. 2447) (Emphasis added).

Did such instructions require only a mere possibility rather than a dangerous probability, of successful monopolization essential to conviction of an attempt to monopolize?

4. Was petitioner wrongfully convicted of attempting to monopolize the dissemination of news by newspapers and the dissemination of news and advertising by radio and television by imputing liability to him for acts not done by him or under his direction?

5. In a lengthy, complex, non-conspiracy antitrust prosecution, is the right of an individual defendant to a fair trial adequately safeguarded by a joint trial with a corporate defendant in which most of the charges and evidence were inapplicable to the individual, the rulings on admissibility of evidence were often erroneous or confusing, and in which the court submitted all charges (except one) to the jury against the individual?

Statute Involved.

The statute involved is Section 2 of the Sherman Act, 15 U. S. C., Sec. 2, which at the time of the indictment read as follows:

> "§ 2. *Monopolizing trade a misdemeanor; penalty.*
>
> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Statement.

As the petition in the *Star* case points out, the decision below involves grave and far-reaching consequences to the entire newspaper industry. The decision also involves questions of fundamental and widespread significance in the administration of justice in protracted, complex criminal prosecutions such as this case. Involving as it does the regulation of business conduct under the Sherman Act, its impact will be felt not merely by petitioner but by virtually every newspaper and every businessman doing interstate business in the United States. Petitioner was indicted, tried and convicted, as a principal, of the substantive offense of attempting to monopolize portions of trade and commerce with which he had no connection whatever.

Petitioner Was Convicted by Imputing to Him Criminal Responsibility for Acts Not Done by Him or under His Direction.

Petitioner is Director of Advertising and a Director of the Star. Prior to 1950 his duties were confined solely to the local advertising section of the Advertising Department (R. 2267-9).

He has had no connection with or supervision over *news gathering or dissemination*. The Star has a separate editorial and news department under the supervision of other officers. Petitioner was concerned solely with the advertising phase of the newspaper operation.

The Star also operates radio station WDAF and television station WDAF-TV at a separate location. Each of these stations has its own organization, does substantial business and is operated separately from the newspaper Each has its own advertising solicitation department (R. 2267-9, 2343).

In spite of this, petitioner was charged with and convicted of attempting to monopolize the dissemination of *news* and advertising through newspapers, radio and television (R. 8-9). Such a conviction was possible only by failing to require proof of the essential elements of the charges and by imputing to petitioner criminal liability for conduct as to which he was a perfect stranger.

This is not a conspiracy case in which the acts or statements of one conspirator may be imputed to all nor did the indictment charge merely an unreasonable restraint of trade.

The Field of Competition.

The field of competition was so defined as to exclude other mass media in competition with the Star. The indictment defined an arbitrarily and artificially narrow market or area of competition. The District Court adopted as a matter of law (and in effect further limited) the narrow market chosen by the Government. (We refer to and incorporate by reference the petition in behalf of the Star, pp. 6-15.)

Unit Advertising Rates.

The District Court permitted the jury to convict petitioner on the basis of the unit advertising rate policy of the Star *alone* (R. 2452-6). In *Times-Picayune Pub. Co. v. United States,* 345 U. S. 594, this Court held that the legitimate business aims which motivated the use of unit advertising rates negatived the inference of the specific wrongful intent essential to an attempt to monopolize. But the District Court in this case did not submit to the jury the issue of legitimate business aims, and permitted the jury to convict in the absence of this essential element of the offense (R. 2452-6).

The record is replete with uncontroverted evidence which clearly established the legitimate business motivations with which the Star continued the unit advertising rate policy established by its predecessor fifty years ago.[1] As this Court found in the *Times-Picayune* case this unit rate policy is followed by practically all newspapers having morning and afternoon issues. It does not constitute tying and constitutes no evidence of intent to monopolize. (Petition of the Star, pp. 16-23).

There was likewise no dispute concerning the fact that petitioner had not established the unit advertising rate policy and he personally had no power or authority to change that policy (R. 1855-6, 2401-2, 2405-6).

Petitioner Was Unfairly Tried and Convicted.

The Joint Trial Unfairly Prejudiced Petitioner's Rights.

Petitioner's motion for severance was overruled and he was tried jointly with the Star (R. 254-6). In addition to the charges concerning news, radio and television, many of the other purported charges in the indictment did not involve solicitation of newspaper advertising and were inapplicable to petitioner (R. 3-14). These included charges with respect to credit, the unit combination subscription rate policy, low subscription rates for the Star, the acquisition of certain assets from the bankrupt estate of the Journal, and other purported charges (R. 9-12).

The joint trial lasted over five weeks. More than one hundred witnesses testified and several hundred exhibits were introduced. The transcript comprises over 4,000 pages

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[1]DX 30, 77, R. 2873-9, 3068x-78; R. 1811-21, 2078-9, 2199-2200; DX 25(a), 25(b), 25(c), 35(a), 35(b), 35(c), 35(d); R. 2861-5, 2883-9; R. 626-7, 1784-1811, 1827-45; DX 27-29, R. 2868-72; R. 1100, 1821, 2081-2, 2394-7.

exclusive of exhibits and the printed record consists of ten volumes and exceeds 3,000 pages. Only a small portion of the 91 Government witnesses gave testimony which related to petitioner, and fewer than one-half of the Government exhibits were admitted as to him.[2] Throughout the trial, however, petitioner's name figured in much of such incompetent evidence, because of his executive position at the Star.

In response to objections to such evidence in behalf of Sees, the trial court frequently instructed the jury that such evidence should not be considered against Sees "unless connected up" with him or unless it applied to him. But the court never indicated what evidence had been connected up or how the jury should determine whether such evidence had subsequently been connected up.

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[2]None of the testimony of the following witnesses was admitted as to Sees: Aronoff, R. 371; Scott, R. 422; Weiss, R. 449; Fluke, R. 456; Frazier, R. 496; Weiss, R. 565; Sevra, R. 617; Strafer, R. 629; Pickerell, R. 641; Sosland, R. 666; Nelkin, R. 704; Stallings, R. 711; Levinson, R. 722; Rolsky, R. 739; Lapides, R. 743; Durbin, R. 765; Anderson, R. 777; Cumonow, R. 894; Braun, R. 902; Rendigs, R. 909; Bebb, R. 934; Reynolds, R. 965; Tait, R. 971; Gerling, R. 984; Jones, R. 994; Caldwell, R. 1032; Smith, R. 1103; Baier, R. 1113; Nixon, R. 1125; Dickinson, R. 1134; Wangerin, R. 1141; Cox, R. 1153; Rose, R. 1175; Taylor, R. 1207; Burns, R. 1232; Price, R. 1293; Raley, R. 1306; Stockwell, R. 1314; Wight, R. 1320; Hartman, R. 1328; Harper, R. 1338; Evans, R. 1345; Peaster, R. 1364; Manson, R. 1371; Mindlin, R. 1404; Gary, R. 1418; Hardy, R. 1430; Tidwell, R. 1436; Russell, R. 1450; Pierson, R. 1473; Higgins, R. 1484; Whalen, R. 1495; Lorenzen, R. 1542; Potter, R. 1568; Weiss, R. 1571; McLeod, R. 1574; Smith, R. 1589; Mnookin, R. 1649; Pautz, R. 1668.

In at least 135 instances the court sustained Sees' objections, "unless connected up," or in some other manner: Herbert R. Aronoff, R. 379, 380, 381, 386, 390, 391; Paul Scott, 431, 435, 436, 438, 442; Richard A. Fluke, 459-60, 461; Tom Crawford, 464, 466, 467; Robert J. E. Frazier, 505, 506; Harry Weiss, 569, 571; Pierce Adams, 575, 586, 587; Lee Graves, 610; Richard Strafer, 632; Wayne

The Court Erroneously Submitted to the Jury All Charges and All Evidence Against Petitioner.

In its final charge, the court read and submitted to the jury every charge in the indictment, including those not connected with petitioner, with the possible exception of the unit subscription rate (R. 2436-61). At least sixteen times during the charge the court erroneously submitted to the jury evidence and charges inapplicable to petitioner by repeated use of such terms as "defendants," "either or both defendants," "they," "their actions," "parties," etc. (R. 2445, 2448, 2448-9, 2450, 2451-2). In addition the court charged the jury that it could consider "all evidence" of acts prior to 1950 on the issue of intent, "all of the acts committed during 1950-53," "all of these facts," "all the other evidence in the case," "all of this evidence" against petitioner (R. 2445, 2448, 2449, 2451-2). The court also read to the jury every purported charge in the indictment as applicable to petitioner (R. 2441-43).

Pickerell, 642, 644, 647, 648, 651; Benjamin Sosland, 675; Henry G. Nelkin, 706; Wm. R. Stallings, 715, 716-7; J. Levinson, 724, 733, 735; Emanuel Rolsky, 741; Joseph Lapides, 744, 748, 752, 757; Geo. B. Durbin, 767, 768-9, 773; C. Gordon Anderson, 780-1, 782, 790, 797; John Maitland Cook, 854-5, 861, 862, 865, 867, 868-9; Lloyd Winters, 874; Louis A. Cumonow, 896; Paxton D. Rendigs, 910-911, 913, 915, 917; Alexander Clark, 920, 922; Mrs. Chas. Bebb, 936, 937, 938; Philip J. Troy, 944; O. R. Reynolds, 969; Herbert B. Tait, 973, 976; Henry Gerling, 985, 986-7, 989; C. C. Jones, 995; R. B. Caldwell, 1032-3, 1034, 1035; Chas. K. Walden, 1046-7, 1055; Ralph J. Smith, 1104, 1108; Abe Baier, 1115, 1119-20; James Nixon, 1127; Glen W. Dickinson, 1136; Richard Wangerin, 1147, 1151-2; Stanley Rose, 1176, 1179; Kurt Levi, 1183, 1184-5; Vincent Crimmons, 1192, 1194; Ruth Seufert, 1200, 1219, 1222, 1223; Ralf L. Burns, 1233, 1236; Harry B. Greenberg, 1245; John H. Stark, Jr., 1270, 1274, 1276-7, 1278; Harold O. Price, 1295; Gene Raley, 1307-8; Gale Stockwell, 1315; Paul P. Wight, 1322, 1325; Edwin C. Hartman, 1330, 1335; Norman Harper, 1340; Tom L. Evans, 1346-7, 1363; Norman Peaster, 1367; N. E. Manson, 1390; Stanley L.

The Court Substituted Mere Possibility for Dangerous Probability in Defining Attempt to Monopolize.

The court's charge also misdefined the offense of attempted monopolization by instructing the jury that a mere likelihood or possibility of success was all that was necessary to convict petitioner (R. 2443-4).

The Court of Appeals affirmed the conviction and denied petitioner's petition for rehearing.

Reasons for Granting the Writ.

I.

The Rulings on Unit Advertising Rates Conflict with Times-Picayune Pub. Co. v. United States, 345 U. S. 594, and Syracuse Broadcasting Corp. v. Newhouse, 236 F. 2d 522 (2nd Cir., 1956).

The decision herein conflicts with the controlling decision in *Times-Picayune Pub. Co.* v. *United States,* 345 U. S. 594, which was more recently followed by the Court of Appeals for the Second Circuit in *Syracuse Broadcasting Corp.* v. *Newhouse,* 236 F. 2d 522 (2nd Cir., 1956). The

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Mindlin, 1406, 1408, 1411; Nell Gary, 1420, 1423; Myer Weneck, 1428; James Hardy, 1431-2; Ronald Tidwell, 1440, 1442; Luke Russell, 1456; James W. Coy, 1459; Homer Pierson, 1475; Delbert Ewing, 1488-9; Leo M. Weiss, 1573; J. E. McLeod, 1578, 1579; Leo Smith, 1594, 1596, 1600; Russell Swanson, 1608; Harrison Houghton, 1624, 1626-7; Robert Goodfriend, 1639, 1641, 1644, 1647-8; I. J. Mnookin, 1650, 1651; Frederick Harpst, 1657; Homer Pautz, 1669, 1674; Harrison Houghton, 1690-1.

Government exhibits not admitted as to Sees include: GX 3, R. 2543; 12, R. 2553-4; 13, R. 2554-5; 23, R. 2555-7; 24, R. 2558-9; 29-32, R. 2563-9; 33-42a, R. 2571-91; 43-45, R. 2593-2603; 46-59, R. 2605-59; 60-71, R. 2661-2707; 73-75, R. 2709-13; 137, R. 2735; 138, R. 2737-8; 140, R. 2739-41; 145, R. 2746-8; 146, R. 2748-9; 147, R. 2749-51; 157, R. 2758; 158, R. 2759; 160, R. 2761; 162, R. 2763-75; 172, R. 2776; 175, R. 2779-80; 176, R. 2780.

trial court instructed the jury that petitioner could be convicted on the basis of the existence of the unit advertising rate practice alone. The court summarized its lengthy instruction on this issue as follows (R. 2456):

> "In short, you are instructed that if you find that the defendants used the forced combination arrangement between two newspapers, and that the papers or either of them were dominant, and that such practice was intended to achieve or maintain monopoly, then I instruct you that you would be justified upon that evidence alone in returning a verdict of guilty * * *."

The instruction thus submitted to the jury only three conditions as a prerequisite to petitioner's guilt: (1) that the combination arrangement was used by two newspapers, (2) that either or both of them were dominant, and (3) that the practice was "intended to achieve or maintain monopoly."

Here, as in *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594, and *Syracuse Broadcasting Corp.* v. *Newhouse*, 236 F. 2d 522, the theory of the tying cases was *inapplicable*. But the theory was erroneously used to convict petitioner.

Legitimate Business Aims.

As in the *Times-Picayune* case, legitimate business aims motivated the continuation of the unit advertising rates.

The evidence in the present case clearly and indisputably established that simplification of operations, increased efficiency, reduced costs and rates, etc., motivated the continuation of the unit advertising rates by the Star. (See pp. 18-19 of the Star's petition, incorporated by reference herein.) There was no evidence to the contrary. Indeed, the

evidence here was virtually identical with the evidence relied on by this Court in ruling in the *Times-Picayune* case that the Government had failed as a matter of law to prove specific intent. The established and uncontroverted business reasons underlying the use of unit advertising rates are antithetical to a specific intent to monopolize.

The trial court, however, did not submit to the jury this question, which under the controlling decision in the *Times-Picayune* case was dispositive of the charge of attempt to monopolize (R. 2452-6). On the contrary, the instruction does not even mention legitimate business aims.

No Specific Intent.

The existence of the unit advertising rate practice was not disputed. It applied only to general and classified advertising, as in *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594 (GXs 43-71, R. 2593-2707). It was established more than fifty years ago by a predecessor of the Star Company (R. 1791, 1844). Petitioner neither established the policy nor could he have changed or abolished it (R. 1856, 2401-2, 2405-6).

The only evidence relied on by the Court of Appeals (App. A, p. A24) (and there was no other evidence) was that a few advertisers complained of the unit rates. The same type of evidence, multiplied many times, was introduced and relied on by the trial court in the *Times-Picayune* case, 105 F. Supp. 670, 674-76. This Court, however, reversed the judgment against the Times-Picayune thus ruling such evidence insufficient as a matter of law to prove specific intent. On the issue whether the unit advertising rates there involved constituted an attempt to monopolize, the ruling of the Court was clear and categorical (pp. 626-7):

"An insufficient showing of specific intent vitiates this part of the Government's case.

* * *

"* * * only the adoption of the unit rates remains to support the alleged violation of § 2 of the Sherman Act. Since we have viewed that step as predominately motivated by legitimate business aims, this record can not bear out the specific intent essential to sustain an attempt to monopolize under § 2."

We submit that the instruction irreconcilably conflicts with the ruling in *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594.

The other errors, misstatements and omissions in the charge concerning unit advertising rates, which squarely conflict with the *Times-Picayune* case, and which are common to both petitioners, are more fully discussed in the separate petition in behalf of the Star and are incorporated herein by reference (pp. 16-23).

The effect of the Court of Appeals' decision in this case with respect to unit advertising rates is to transform the heretofore legitimate unit advertising rate practice into a *per se* antitrust offense. If sound business considerations are ruled out wherever unit advertising rates are utilized, businessmen will no longer be able to operate their businesses on a sound, efficient basis. But these considerations have always been highly relevant, if not controlling, in determining whether an attempt to monopolize exists. (See *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594; *United States* v. *Columbia Steel Company*, 334 U. S. 495 (1948); *United States* v. *Yellow Cab Company*, 338 U. S. 338, affirming 80 F. Supp. 936 (N. D. Ill., 1948). Cf. *Board of Trade of City of Chicago* v. *United States*, 246 U. S. 231 (1918).) (See also pp. 18-19 of the petition of the Star incorporated herein by reference.)

II.

The Market Rulings Conflict with the du Pont Cellophane Case and Other Decisions.

The District Court defined the market as a matter of law, rather than submitting this issue to the jury as an issue of fact, and arbitrarily delineated the market so narrowly as to conflict with the decision of this Court in *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377. The rulings giving rise to this conflict are more fully discussed in the petition of the Star, pp. 12-14, which are referred to and incorporated herein.

The importance of a correct definition of the relevant market in a Section 2 case cannot be over-emphasized. See *Syracuse Broadcasting Corp.* v. *Newhouse*, 236 F. 2d 522 (2nd Cir., 1956). If the Government is permitted to define the market narrowly enough, every sizeable business could be subject to prosecution as a monopolist or an attempted monopolist as to some portion of its business. And so could every small business or country store which happens to be the only business in its neighborhood.

Market definition is particularly important to the newspaper industry, inasmuch as over 92% of all daily newspapers published in this country are the only dailies in their respective communities. It is vitally important in the administration of the antitrust laws that the realities of competition which such newspapers face be given full recognition in defining the competitive market in which they operate.

III.

Petitioner's Conviction Was Not Based on His Personal Conduct, but Resulted from the Erroneous Application of the Civil Doctrine of Vicarious Liability.

Petitioner's conviction herein was made possible only by the erroneous application of the civil doctrine of imputed or vicarious liability. Petitioner was charged with and convicted of attempting to monopolize the dissemination of news and advertising in interstate commerce in a product or services market consisting of newspapers, radio and television (Indict., Pars. 6, 23, 26 and 29; R. 5, 8-9, 13).

Petitioner had no duties or responsibilities connected with the gathering or dissemination of news. Indeed, petitioner's evidence showed that monopolization (and hence attempted monopolization) of the dissemination of news was an impossibility (R. 2255-6). There was no evidence within the indictment period tending to connect petitioner with any aspect of the Star's radio or television operations.

But this Court has repeatedly held that, "Guilt with us remains individual and personal even as respects conspiracies." See *Kotteakos* v. *United States*, 328 U. S. 750, 772. It is axiomatic that, in the absence of conspiracy, there can be no criminal liability without fault, even though the accused may be a corporate executive. *Paschen* v. *United States*, 70 F. 2d 491, 503 (7th Cir., 1934); *United States* v. *Food & Grocery Bureau*, 43 F. Supp. 966 (S. D. Cal., 1942).

The theories adopted by the Government and the courts below in sustaining petitioner's conviction that petitioner was a corporate executive and that advertising and news are interdependent are nothing more than attempts to impute criminality to petitioner on bases other than his own personal conduct.

IV.

The Definition of Attempt to Monopolize Conflicts with Swift & Co. v. United States, 196 U. S. 375, and American Tobacco Co. v. United States, 328 U. S. 781, and with Decisions of Other Courts of Appeals.

The most fundamental question which arises in every action instituted under the antitrust laws concerns the proper definition of the elements of the offense alleged or charged. This problem is necessarily involved in every phase of the proceeding, and is basic to questions concerning the sufficiency of the pleadings, the scope of discovery procedures (in a civil action), the issues to be tried, the admissibility of evidence, and finally, and most important of all in a criminal prosecution, in the instructions to the jury. The final charge to the jury is so important that, whether or not so requested, the trial court must specifically, accurately and clearly instruct the jury concerning every element of the offense charged, and any error in this respect is deemed prejudicial and reversible *per se*. *Morissette* v. *United States*, 342 U. S. 246, 274.

Thus, the conflict created in this case by the trial court's erroneous definition of attempt to monopolize, which received the approval of the court of appeals, is a conflict on an issue vitally important in every step of every antitrust case involving an alleged attempt to monopolize, and is particularly important in the present case.

Since the decision in *Swift & Co.* v. *United States*, 196 U. S. 375 (1905), the law has been settled that proof of a dangerous probability of monopolization is essential to an unlawful attempt to monopolize. *Lorain Journal Co.* v. *United States*, 342 U. S. 143; *American Tobacco Co.* v. *United States*, 328 U. S. 781; *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (2nd Cir., 1945); *Mackey* v. *Sears*,

Roebuck & Co., 237 F. 2d 869, 873 (7th Cir., 1956). It is equally clear that acts and practices by a single trader in a competitive market which it could not successfully monopolize if all of such acts and practices were successful, involve at most mere incipient restraints which do not rise to the level of attempts to monopolize cognizable under Section 2 of the Sherman Act.[8]

The charge in this case squarely conflicts with principles established in the *Swift & Co.* case and other cases, *supra*. The trial court charged the jury that an attempt to monopolize required only specific intent together with the employment of methods and practices "which if successful would be *likely* to accomplish monopolization" (R. 2443-4) (Emphasis added). The court gave additional emphasis to this instruction by repeating it a second time. The instruction defining "specific intent" only emphasized the other erroneous definition for it stated that, " 'Specific intent' means that the defendants must have done certain things with monopoly as their objective which, if successfully performed, *could* result in actual monopolization" (R. 2447) (Emphasis added).

Thus, a mere possibility was substituted for the *dangerous probability* essential to an attempt to monopolize. Even Section 2(a) of the Clayton Act, which is aimed at "incipient incipiency," and which requires only that the effect of a prohibited discrimination "*may be*

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[8]Conduct which does not rise to the level of an attempt to monopolize might, of course, be subject to Section 1 of the Sherman Act, or to the provisions of the Clayton Act aimed at incipient restraints, for the very purpose of the Clayton Act is to reach incipient restraints which is not proscribed by the Sherman Act. 15 U. S. C., Sec. 12, *et seq.*; *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, 355-6 (1922). See also *Times-Picayune Pub. Co. v. United States*, 345 U. S. 594 (1953). But this case involves only Section 2 of the Sherman Act.

substantially to lessen competition," is not violated where no more than a mere possibility of harm exists.[4]

The definition of attempt to monopolize thus conflicts squarely with principles adhered to since *Swift & Co.* v. *United States*, 196 U. S. 375, 402. It fails to recognize and to outline clearly the vital difference of *degree* between a mere preparation or mere possibility and a punishable attempt. The question of what conduct advances far enough towards success to constitute a punishable attempt to monopolize is in essence a "question of proximity and degree." *Swift & Co.* v. *United States*, 196 U. S. 375, 402. By eliminating that vital question from the jury's consideration, or by failing to spell out this basic distinction in the clearest possible terms, the trial court permitted the jury to convict on the basis of an improper definition of the offense charged.

"A conviction ought not to rest on an equivocal direction to the jury on a basic issue." *Bollenbach* v. *United States*, 326 U. S. 607, 613 (1946); *Bloch* v. *United States*, 223 F. 2d 297, 298 (9th Cir., 1955).

V.

Petitioner Was Denied a Fair Trial.

No conspiracy was charged in this case. Petitioner could not, therefore, be convicted in a criminal case for the conduct of others which he did not direct, authorize or participate in. The doctrine of agency or imputed liability has no application here.

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[4] "* * * the use of the word 'may' was not to prohibit discriminations having 'the mere possibility' of those consequences, but to reach those which would probably have the defined effect on competition." *Corn Products Refining Co.* v. *F. T. C.*, 324 U. S. 726, 738 (1945). See also *F. T. C.* v. *Morton Salt Co.*, 334 U. S. 37, 46; *Standard Fashion Co.* v. *Magrane Houston Co.*, 258 U. S. 346, 356-7.

Petitioner's Basic Rights Were Prejudiced by the Joint Trial.

The length and complexity of the trial, and the District Court's frequent, confusing rulings that evidence was not admitted against petitioner, unless "connected up" or unless it applied to him, made it impossible for the jury rationally to segregate and consider against petitioner only that evidence competent against him.

In these circumstances the problems of preventing the improper transference of impressions of guilt and guilt by association became virtually insurmountable. Prejudice in such a situation results not from a single erroneous or confusing ruling, nor from the admission and improper consideration by the jury of a single or a few incidents, but from an aggregation of such incidents throughout the course of the protracted five-week trial. It taxes credulity to conclude that a lay jury, or anyone else for that matter, could have any rational conception of the evidence competent against petitioner.

The Submission Against Petitioner in the Final Instructions of Many Charges Not Connected with Him Denied Him a Fair Trial.

It is very doubtful whether the clearest of instructions to the jury could have eliminated the confusion by the conclusion of the five-week trial. The instructions which the trial court gave with respect to petitioner were neither clear nor correct. Throughout the instructions the trial court dealt with both defendants indiscriminately. The court read all of the charges against both petitioner and the Star although most of the charges were never connected with petitioner. Then the court specifically applied every one of its instructions, except the instruction dealing with unit subscription rates, against both petitioner and the

Star. No fewer than twenty times during the charge the court instructed the jury that they could consider all charges and all evidence in the case against both defendants (R. 2445, 2448, 2448-9, 2450, 2451, 2451-2, 2459).[5]

The sole instruction purporting to inform the jury as to petitioner's individual liability was given at the end of the hour-long charge (R. 2458-59). We submit that it was totally ineffective when considered with the entire remainder of the charge and in light of the confusing developments of the protracted trial. See *Krulewich* v. *United States*, 336 U. S. 440, 453 (1929); *Nash* v. *United States*, 229 U. S. 373, 380 (1913); *United States* v. *Central Supply Ass'n*, 6

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[5]Typical examples are:

"However, I instruct you that you should consider this evidence of surveillance in the light of *all the other evidence in the case*, in deciding whether it was so extensive and proceeded to such an extent as to be indicative of an intent and purpose to secure for the *defendants* such a share of available business * * *." (R. 2448) (Emphasis added).

* * * * *

"* * * If you find and believe from the evidence that *either or both of the defendants*, with the purpose of creating or maintaining a monopoly, dictated to prospective advertisers that they could advertise through the newspaper, *radio* or *television* media of The Kansas City Star Company only upon certain conditions which worked commercial harm to other publications to the extent that it constituted an attempt to monopolize or monopolization by *defendants*, then you must find *either or both of the defendants* guilty of an attempt to monopolize and guilty of monopolization." (R. 2450) (Emphasis added).

The court concluded its instructions, after purporting to instruct as to petitioner's individual liability, as follows:

"* * * if you find beyond a reasonable doubt that the defendant Emil A. Sees committed *the acts as charged to him in Count I of the indictment* and described to you in this charge within the period January 7, 1950 to January 6, 1953, with the specific intent to monopolize the dissemination of news and advertising in the metropolitan area of Kansas City as defined in this charge, then you will return a verdict of 'guilty' against the defendant Sees on Count I of the indictment." (R. 2459) (Emphasis added).

F. R. D. 526, 533-4 (N. D. Ohio, 1947); *United States* v. *Standard Oil Co.*, 23 F. Supp. 937, 939 (W. D. Wis., 1938); *United States* v. *Haupt*, 136 F. 2d 661 (7th Cir., 1943); *Schmeller* v. *United States*, 143 F. 2d 544, 550 (6th Cir., 1944).

This Court held in *Nash* v. *United States*, 229 U. S. 373, 380, that the failure specifically to withdraw charges not supported by evidence is vital and reversible error (p. 380):

> "The fifth, sixth and eighth statements of means to be employed were withdrawn from the jury, but the jury's attention seems not to have been called to the fact that some of the charges were abandoned, in the connection in which it was important. * * * It is unnecessary to consider whether there was any evidence sufficient to warrant a conviction upon some of the other means alleged, for instance the first, as the absence of such evidence only would add another reason for holding the instructions wrong upon a vital point."

A fair trial depends upon the ability of the jury to follow instructions. *Opper* v. *United States*, 348 U. S. 84, 95 (1954). However, it is for ordinary lay minds, not for psychoanalysts that our rules of procedure, evidence and instructions are framed (*Shepard* v. *United States*, 290 U. S. 96, 104). It is equally true that our jury system is based upon and presupposes the ability of the jury to grasp and retain the evidence and reach rational conclusions therefrom, and upon the trial court's making the rulings on evidence, the procedures and the instructions so clear and comprehensible that a lay jury will be able properly to perform its function.

Petitioner's Conviction Presents Questions of Vital Importance Concerning the Administration of Federal Criminal Law.

The present case also presents for the first time in this Court important questions concerning the administration of justice in a criminal non-conspiracy antitrust case of unusual magnitude and complexity. Not until recent years have the courts and commentators fully comprehended the unique difficulties arising out of the necessity of adjudicating the legality of business practices of tremendous magnitude and complexity within the framework of our traditional judicial system. The landmark Report of the Judicial Conference of the United States on "Procedure in Antitrust and Other Protracted Cases" (1951), 13 F. R. D. 62, points up the gravity of the problems involved and suggests a number of partial solutions which may be helpful but do not wholly solve the problems.

Most of the procedures suggested in the Report are inappropriate to a criminal prosecution such as the present one. Further, the trial court here did not take advantage of the limited available procedures, such as a detailed bill of particulars and a separate trial of petitioner, which might have simplified the case and assured petitioner of a fair and unbiased hearing and determination of his innocence or guilt.[6]

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[6]Petitioner unsuccessfully moved to dismiss the indictment for fatal vagueness and for a bill of particulars (R. 2524, 121-33). Petitioner also moved in advance of trial for a severance and separate trial, on the ground *inter alia* that confusion, prejudice and injustice would result from a protracted joint trial and the inevitable admission of vast amounts of evidence incompetent against, and highly prejudicial to, petitioner, but his motion was overruled (R. 254-6).

This case calls for the formulation and application of proper standards for the enforcement of federal criminal law in protracted trials of antitrust litigation so as to assure petitioner and others similarly situated not merely the minimal requirements of due process, but the maintenance of standards of procedure and evidence which will adapt our judicial system to fair and just adjudications in trials of complex, protracted criminal cases such as this, particularly where the liberty and reputation of individuals are involved. See *McNabb* v. *United States*, 318 U. S. 332, 340-1 (1943).

Conclusion.

For the foregoing reasons and for the reasons set forth in the petition of the Star we submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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